No. 98-369

In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, WASHINGTON, D.C., AND NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, OFFICE OF THE INSPECTOR GENERAL, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY, AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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INTRODUCTION

On August 28, 1998, the National Aeronautics and Space Administration Headquarters (NASA-HQ) and Office of the Inspector General (NASA-OIG) (jointly referred to as "the agency"), petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit. The opinion of the court of appeals is reported at 120 F.3d 1208.

(Pet. App. 1a-20a.)[1] The decision and order of the Federal Labor Relations Authority (Authority) is reported at 50 FLRA 601. (Pet. App. 21a-57a.)

It is the position of the respondent Authority that the Eleventh Circuit decision is correct and should be affirmed. However, a division among the circuits exists over the resolution of the major issue in this case: the entitlement of an exclusive representative of federal employees to be present when a bargaining unit employee is examined by an Office of the Inspector General (OIG) agent as provided for in 5 U.S.C. 7114(a)(2)(B). This division causes uncertainty for all participants in federal government labor-management relations. Moreover, resolution of the issue is of considerable import because it impacts on this fundamental representational right that Congress provided to federal employees in the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. 7101-7135 (1994 & Supp. II 1996). Accordingly, the Authority does not oppose granting the present petition.

STATEMENT

A. Background - The Federal Service Labor-Management Relations Statute

The Statute governs labor-management relations in the federal service. Under the Statute, the responsibilities of the Authority include adjudicating unfair labor practice complaints, negotiability disputes, bargaining unit and representational election matters,

[1]The court's denial of the agency's petition for rehearing and suggestion of rehearing *en banc* is also appended to the petition. (Pet. App. 75a-76a.)

and resolving exceptions to arbitration awards. *See* 5 U.S.C. 7105(a)(1), (2); *see also Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 93 (1983) (*BATF*). The Authority thus ensures compliance with the statutory rights and obligations of federal employees, labor organizations that represent such federal employees, and federal agencies. The Authority is further empowered to take such actions as are necessary and appropriate to effectively administer the Statute's provisions. *See* 5 U.S.C. 7105(a)(2)(I); *BATF*, 464 U.S. at 92-93.

The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *See BATF*, 464 U.S. at 92-93; *Federal/Postal/Retiree Coalition* v. *Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *BATF*, 464 U.S. at 97.

The Statute makes it an unfair labor practice for a federal agency employer to, among other things, "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]," or "otherwise fail or refuse to comply with any provision" of the Statute. 5 U.S.C. 7116(a)(1) and (8). The instant case involves an unfair labor practice under section 7116(a)(1) and (8) and concerns the Authority's interpretation of the representational right set forth in section 7114(a)(2)(B) of the Statute.

Section 7114(a)(2)(B) provides that an exclusive representative "shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation" if the employee reasonably

believes that discipline may result from the examination and the employee requests representation. 5 U.S.C. 7114(a)(2)(B). This statutory provision extends to federal employees the right to union representation provided in the private sector by the NLRB through its interpretation of the National Labor Relations Act (NLRA) and the Supreme Court's decision in *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975) (*Weingarten*). *See* 124 Cong. Rec. 29,184 (1978), *reprinted in Subcommittee on Postal Personnel and Modernization of the Committee on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 926 (1979) (*Legis. Hist.*) (Congressman Udall explained that the House bill provisions which led to the enactment of section 7114(a)(2)(B) were intended to reflect the Supreme Court's decision in *Weingarten*); *Internal Revenue Serv., Wash., D.C.* v. *FLRA*, 671 F.2d 560, 563 (D.C. Cir. 1982) (same).

Although representational rights under section 7114(a)(2)(B) and *Weingarten* were intended to be similar, Congress also recognized that the right to representation might evolve differently in the private and federal sectors, and that NLRB decisions would not necessarily be controlling in the federal sector. *See Legis. Hist.* at 824; *U.S. Immigration and Naturalization Serv., N.Y. Dist. Office, N.Y., N.Y.*, 46 FLRA 1210, 1218 (1993), *review denied sub nom. American Fed'n of Gov't Employees* v. *FLRA*, 22 F.3d 1184 (D.C. Cir. 1994). Moreover, in the federal sector the *Weingarten* representation right is expressly codified in the Statute, whereas the same right in the private sector inheres in the employee's guarantee to

id and protection. *See* act in concert for mutual aid a esentation right set *Weingarten*, 420 U.S. at 256, 260. Authority has

In interpreting the statutory represent agent to be a forth in section 7114(a)(2)(B), the Aut 7a, 40a.) As established that it considers an OIG agent rly seeks "representative of the agency." (Pet. App. 37a, 40 OIG such, when a bargaining unit employee properly s cted and is denied union representation in an OI investigation, the employee's and the union's protected rights under section 7114(a)(2)(B) are violated and an unfair labor practice has occurred. *See id.* at 48a.

B. Proceedings in the Present Case

1. The Authority's Decision

In this unfair labor practice decision and order, the Authority held that the NASA-OIG investigator was a "representative of the agency" within the meaning of section 7114(a)(2)(B) of the Statute. *Id.* at 40a. Therefore, the actions of the NASA-OIG agent during the course of an investigation and examination of a bargaining unit employee violated the employee's and the union's protected rights under section 7114(a)(2)(B) of the Statute.[2] *Id.* at 48a. The Authority then found that both NASA-HQ and NASA-OIG were responsible for NASA-OIG's violation of the Statute. *Id.* at 48a-49a. Accordingly, the Authority issued an appropriate remedial order. *Id.* at 52a-53a.

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[2]The NASA-OIG agent allowed the union representative to be present during the investigation of the bargaining unit employee, but the Authority concluded that because of restrictions placed on the union representative's participation, the conduct of the investigatory interview violated section 7114(a)(2)(B). *Id.* at 46a. In the court below, this finding was not contested by the agency. *Id.* at 6a n.4.

a. The NASA-OIG Agent Acted as a "Representative of the Agency"

The Authority based its finding that the NASA-OIG agent was acting as a "representative of the agency," NASA-HQ, on three fundamental conclusions:

> (1) the term "representative of the agency" under section 7114(a)(2)(B) should not be so narrowly construed as to exclude management personnel employed in other subcomponents of the agency; (2) the statutory independence of agency OIGs is not determinative of whether the investigatory interviews implicate section 7114(a)(2)(B) rights; and (3) section 7114(a)(2)(B) and the [Inspector General] Act[3] are not irreconcilable.

Id. at 40a-41a. The Authority reached these conclusions after review of the relevant case law, and the statutory language and legislative history of both the Statute and the Inspector General Act.

In reviewing the relevant case law, the Authority first noted its holding in *Department of Defense, Defense Criminal Investigative Service; Defense Logistics Agency and Defense Contract Administration Services Region, New York*, 28 FLRA 1145 (1987) (*DOD, DCIS*), *enforced sub nom. Defense Criminal Investigative Service, Department of Defense* v. *FLRA*, 855 F.2d 93 (3d Cir. 1988) (*DCIS*), and explained that it has long held that an OIG investigator is considered to be a "representative of the agency" within the meaning of section 7114(a)(2)(B). (Pet. App. 37a.) It further explained that although the Third Circuit affirmed this conclusion in *DCIS*, the D.C. Circuit rejected the

[3]The statutory scheme governing OIGs is set forth in the Inspector General Act of 1978, 5 U.S.C. App. 3 §§ 1-12 (1994 & Supp. II 1996) (Inspector General Act).

Authority's interpretation of section 7114(a)(2)(B) as it pertained to an OIG representative in *United States Department of Justice* v. *FLRA*, 39 F.3d 361 (D.C. Cir. 1994) (*DOJ*). (Pet. App. 37a.)

The Authority carefully reviewed the facts and findings of both *DCIS* and *DOJ*, to include both courts' analyses of the statutory language of section 7114(a)(2)(B) as well as the language and legislative history of the Inspector General Act. (Pet. App. 37a-40a.) After its review of the two cases, the Authority reaffirmed its holding in *DOD, DCIS* and agreed with the Third Circuit's *DCIS* reasoning by concluding that the NASA-OIG investigator was acting as a "representative of the agency" under section 7114(a)(2)(B). (Pet. App. 40a-41a.)

In analyzing the instant case, the Authority first considered which management personnel are obligated to recognize the section 7114(a)(2)(B) representational right, and concluded, consistent with *DCIS*, that the statutory right is not "dependent upon the organizational entity within the agency to whom the person conducting the examination reports." *Id.* at 41a. In other words, the term "representative of the agency" should not be so narrowly construed as to exclude management personnel employed in different components of the agency, such as the OIG.[4] *Id.* at 41a-42a. As it cautioned, "[i]f such were the case, agencies could abridge bargaining unit rights and evade statutory responsibilities under section 7114(a)(2)(B), and thus thwart the intent of Congress, by utilizing personnel from other subcomponents (such as the OIG)

[4]The Authority observed that it is "clear and unchallenged that NASA is an 'agency' under 5 U.S.C. § 7103(a)(3)." *Id.* at 42a.

to conduct investigative interviews of bargaining unit employees." *Id.* at 41a n.22.

Next, the Authority analyzed the statutory independence of the OIG, pursuant to the Inspector General Act, and concluded that this independence does not necessarily exempt OIG investigatory examinations from the provisions of section 7114(a)(2)(B). *Id.* at 42a. Although the Authority explicitly recognized this statutory independence, it determined that the independence is not absolute—especially when the OIG conducts an interview of an employee and reports the findings to the agency for possible disciplinary action, as in the instant case. *Id.*

The Authority then considered the statutory provisions and legislative histories of section 7114(a)(2)(B) and the Inspector General Act and concluded that the two are not incompatible. *Id.* at 43a. First, the statutory language of the two provisions revealed no inconsistencies. *Id.* at 44a. Second, despite the recognized congressional intent that the inspector general be independent from the agency, the Authority found that the purpose of this independence is to insulate the inspector general from agency management pressure—not from compliance with federal labor relations requirements. *Id.* at 45a. Third, based upon the limited representational function of a union representative under section 7114(a)(2)(B), and the benefits to the investigatory process that may result from union involvement, the Authority determined that compliance with section 7114(a)(2)(B) would not place any undue restraint on the conduct of OIG investigative interviews. *Id.* at 46a-47a.

Finally, the Authority noted that even if the two statutes conflicted, it found no congressional intent suggesting that either the Statute or the Inspector

General Act is preemptive of the other. *Id.* at 47a. Thus, the Authority concluded that the Inspector General Act should not trump the Statute. *Id.* at 48a.

b. NASA-OIG Committed an Unfair Labor Practice, for which NASA-HQ Was Equally Responsible

In the final analysis, the Authority held that NASA-OIG failed to comply with section 7114(a)(2)(B) and therefore violated the Statute. *Id.* This finding comports with the Authority's decision in *Headquarters, Defense Logistics Agency, Washington, D.C.*, 22 FLRA 875, 884 (1986) (*DLA*), in which the Authority found that a component of the agency violates the Statute if it engages in behavior that infringes upon the protected rights of employees of another component of the agency.[5] (Pet. App. 48a.) In other words, because the conduct of the NASA-OIG agent, as a "representative of the agency," interfered with the rights of employees in another component of the agency, NASA-OIG violated the Statute. *Id.*

The Authority disagreed, however, with the ALJ's decision to dismiss the complaint against NASA-HQ. *Id.* at 49a. In reviewing the record evidence, the Authority found that NASA-OIG, in its investigative role, represents the interests of NASA-HQ and other NASA-HQ subcomponents. *Id.* at 50a. NASA-OIG shares investigative information with NASA-HQ and NASA-HQ subcomponents, and such information is

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[5]As the Authority explained, "[t]his concept has its genesis in the private sector." (Pet. App. 48a n.26.) Even a non-employer has been sanctioned for violating the rights of bargaining unit employees. *See Hudgens* v. *NLRB*, 424 U.S. 507, 510 n.3 (1976); *Austin Co.*, 101 NLRB 1257, 1258-59 (1952). (Pet. App. 48a-49a n.26.)

used as a basis for disciplinary action. *Id.* In addition, NASA-OIG reports to and is under the supervision of the Administrator of NASA-HQ. *Id.* (citing 5 U.S.C. App. 3 § 3(a)). Based upon these factors, and the Authority precedent applying the *DLA* rationale to the actions of the parent agency and a subcomponent, *see U.S. Dep't of Veterans Affairs, Washington, D.C.*, 48 FLRA 991, 1000-01 (1993), the Authority found NASA-HQ responsible for a statutory violation based upon its failure to ensure that NASA-OIG comply with the Statute. (Pet. App. 50a.)[6]

2. The Court of Appeals' Decision in the Instant Case

The Eleventh Circuit enforced the Authority's unfair labor practice decision and order and denied the agency's petition for review. (Pet. App. 20a). The court agreed with essentially every aspect of the Authority's decision.

Deferring to the Authority's interpretation of the Statute, the court found no error in the Authority's determination that an OIG agent is a "representative of the agency" under section 7114(a)(2)(B). *Id.* at 9a.

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[6]The Authority recognized (Pet. App. 51a.) that in finding the parent agency liable, it was deviating from its holding in the decision underlying the D.C. Circuit's *DOJ* decision, *U.S. Department of Justice, Washington, D.C. and U.S. Department of Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota and Office of Professional Responsibility, Washington, D.C.*, 46 FLRA 1526, 1571 (1993). Based upon its analysis in the instant case, however, the Authority concluded that holding NASA-HQ, as well as NASA-OIG, responsible for the unfair labor practice committed by NASA-OIG would effectuate the purposes of the Statute because it is appropriate for agency headquarters to advise OIG personnel of their responsibilities under the Statute. *Id.* at 50a-51a.

NASA-OIG had argued to the court that the rights and duties set forth in section 7114(a)(2)(B) derive from the collective bargaining relationship, of which the OIG is not a part. *Id.* at 8a-9a. However, the Eleventh Circuit, like the Authority and the Third Circuit, rejected this argument. *Id.* at 9a-11a.

The court found that reading such a requirement into section 7114(a)(2)(B) "would undermine Congress's purpose in enacting this section." *Id.* at 10a. Noting that section 7114(a)(2)(B) "focuses on the risk of adverse employment action to the employee," the court concluded that "[b]ecause the risk does not disappear or diminish significantly when an investigator is employed in an agency component that has no collective bargaining relations with the employee's union, we see no reason why the protection afforded by Congress should be eliminated in such situations." *Id.* Because the Authority had determined that NASA-OIG performs an investigatory role on behalf of NASA-HQ and its components, the court concluded that the NASA-OIG investigator was a "representative of the agency." *Id.* at 11a.

With regard to the Authority's interpretation of the Inspector General Act, the court did not defer to the Authority, *id.* at 5a, but nevertheless agreed with the Authority's conclusions and its reasoning, *id.* at 12a-15a. The court found nothing in the text or legislative history of the Inspector General Act "to justify exempting OIG investigators from compliance with the federal *Weingarten* provision." *Id.* at 12a.

In considering the congressional intent that OIGs be independent from the agencies they investigate, the court found that "the presence of a union representative at OIG interviews, as mandated by federal statute," is not the "type of interference from which Congress

sought to insulate OIG investigators." *Id.* at 14a. The court explained that it did not foresee a union representative hindering an OIG agent's investigative process. *Id.* It thus concluded that compliance with section 7114(a)(2)(B) is not "sufficiently inconsistent with the [Inspector General] Act to justify an implied exemption for OIG investigators." *Id.* at 15a. Without such a conflict, the court could not justify ruling that the Inspector General Act "impliedly" repealed section 7114(a)(2)(B). *Id.* (citing *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974)). Therefore, the court concluded that NASA-OIG committed an unfair labor practice because the NASA-OIG agent was a "representative of the agency" within the meaning of section 7114(a)(2)(B) and the agent's conduct was in violation of the Statute. *Id.*

After finding that NASA-OIG violated the Statute, the court then agreed with the Authority's determination that NASA-HQ, as parent agency for NASA-OIG, was also responsible for the section 7114(a)(2)(B) violation. *Id.* at 19a. The court acknowledged the Authority's holdings finding a parent agency responsible for a statutory violation by a subcomponent of the agency. *Id.* at 18a.

The court analyzed the Authority's finding that, because NASA-HQ "failed to ensure that NASA-OIG complied with § 7114(a)(2)(B)," it was guilty of an unfair labor practice. *Id.* Although the court recognized NASA-OIG's role as an "'independent and objective' unit" of NASA-HQ, pursuant to 5 U.S.C. App. 3 § 2, it also recognized that NASA-OIG "is subject to the general supervision of the agency head." *Id.* at 19a. Moreover, the court highlighted the fact that the NASA-OIG agent "ordered the employee to answer questions or face dismissal," and this suggested that the NASA-OIG agent was acting on behalf of NASA-HQ.

Id. at 19a. The court therefore found no error in the Authority's determination. *Id.*

THE AUTHORITY DOES NOT OPPOSE THE PETITION

The Authority maintains that the decision of the court below is correct and effectively rebuts the arguments raised in the Petition for a Writ of Certiorari. (Pet. 10-25.) The Authority recognizes, however, that the four courts of appeals that have considered the issue of whether an OIG agent is a "representative of the agency" within the meaning of section 7114(a)(2)(B)[7] have reached three different results.[8] Although the Authority disagrees with the agency's arguments regarding the decision below, it agrees that further review by this Court is warranted.

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[7]In addition to the four courts that have directly considered this issue, the agency references the Fourth Circuit's decision in *United States Nuclear Regulatory Commission* v. *FLRA*, 25 F.3d 229 (4th Cir. 1994) (*NRC*), in support of its arguments in favor of Court review of the issue regarding liability of NASA-HQ. *NRC*, which was decided after *DCIS* but before *DOJ*, arose in the context of a negotiability dispute, and not an unfair labor practice like the four other cases. Further, the Fourth Circuit neither criticized nor viewed its decision as inconsistent with *DCIS*. *See NRC*, 25 F.3d at 235. *See also* Pet. App. 13a n.8.

[8]It should be noted that with regard to one aspect of this issue—what constitutes an "agency" within the meaning of 5 U.S.C. 7103(a)(3)—three of the four courts have concluded that this refers to the parent agency. *See FLRA* v. *U.S. Dep't of Justice, Washington, D.C., U.S. Dep't of Justice, Immigration and Naturalization Serv., New York Dist., N.Y., and Dep't of Justice, Office of the Inspector General, Washington, D.C.*, 137 F.3d 683, 688 (2d Cir. 1998) (*DOJ, INS*); Pet. App. 9a; *DCIS*, 855 F.2d at 98. *Cf. DOJ*, 39 F.3d at 365 (OIG qualifies as an "agency").

There are currently three distinct standards among the circuits regarding whether an OIG investigator is a "representative of the agency." The court below (Pet. App. 9a) and the Third Circuit, in *DCIS*, 855 F.2d at 100, both affirmed the Authority's conclusion that an OIG agent is a "representative of the agency." In contrast, the D.C. Circuit in its *DOJ* decision rejected the Authority's holding and concluded that an OIG agent is not a "representative of the agency." 39 F.3d at 368. Finally, the Second Circuit's determination on this issue falls somewhere between *DOJ* and the positions of the Third and Eleventh Circuits. *See DOJ, INS*, 137 F.3d at 690-91. According to the Second Circuit, an OIG agent is not a representative of the agency when the context of the OIG interrogation involves matters within the scope of the Inspector General Act. *Id.* at 686, 690.[9]

This confusion among the circuits creates uncertainty for employees, unions, and agencies regarding the application of this essential, statutory representation

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[9]The *DOJ, INS* case is procedurally unique, and, in the Authority's view, was erroneously decided as a result. The Authority never considered the case underlying the Second Circuit's decision because the agency did not file exceptions to the Administrative Law Judge's (ALJ) decision and order. Pursuant to the Authority's regulations, *see* 5 C.F.R. 2423.29, if no party excepts to an ALJ's decision, the ALJ's decision and order is adopted, without precedential significance, as the Authority's final decision and order. Because the agency did not comply with the order, the Authority sought summary enforcement in the Second Circuit.

As the Authority argued to the Second Circuit, pursuant to the administrative exhaustion requirements of section 7123(c) of the Statute, the court did not have jurisdiction to consider the merits of the case because no exceptions were filed with the Authority. The court, however, found that it had jurisdiction based upon the "extraordinary circumstances" exception to section 7123(c). 137 F.3d at 687-88. The Authority has received an extension of time to file a petition for a writ of certiorari in *DOJ, INS*.

right. As a result, employees and unions involved in OIG investigations are being wrongfully denied this congressionally created representation right, because, as even the agency observed, "the circuit conflict creates uncertainty for OIGs as to which rules apply to which interviews and investigations." (Pet. 23.) The agency's list of pending unfair labor practice cases brought by federal employee unions substantiates this supposition. *Id.* at 22.

Only this Court can authoritatively rectify the circuit split by ruling on this issue. The importance of this issue to federal employees and federal sector labor-management relations militates for granting the petition in this case.

Finally, although there is no current circuit conflict regarding the issue as to whether the parent agency is liable for the unfair labor practice committed by the OIG, the Authority interposes no objection to the Court's consideration of this issue. The liability of the parent agency will continue to arise as an issue if this Court determines that an OIG agent is a "representative of the agency" within the meaning of section 7114(a)(2)(B). Therefore, resolution of the parent agency liability issue will eliminate future litigation in that regard.

Accordingly, the Authority does not oppose granting the present petition.

Respectfully submitted.[10]

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Attorney

* Counsel of Record

SEPTEMBER 1998

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[10]The Solicitor General authorized the filing of this memorandum and directed the Authority to include the following statement:

I authorize the filing of this memorandum. Seth P. Waxman, Solicitor General.